4. Whether there exists a genuine issue as to any material fact alleged in Counts IV, V and VI of plaintiffs' complaint precluding entry by the District Court of a judgment dismissing said counts.

5. Whether Defendant is entitled to a judgment as a matter of law on Counts IV, V and VI of plaintiffs' complaint.

6. Whether the District Court erroneously dismissed Plaintiffs' claims under the Commodity Exchange Act, as amended, 7 U.S.C. § 1, et seq.

7. Whether the District Court erred in denying Plaintiffs' Motion for Leave to File an Amended and/or Supplemental Complaint.

This designation and statement of issues is made pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure to notify the Clerk of the above Court, the United States Court of Appeals for the Sixth Circuit and Appellee herein, that Appellants do not intend to include the transcript in the record on appeal in this case.

Dated: April 4, 1977

HOOPS & HUDSON

EXCERPTS FROM RESPONDENTS' BRIEF BEFORE THE COURT BELOW

(In the United States Court of Appeals
For the Sixth Circuit)

(J. J. Curran and Jacquelyn L. Curran, Plaintiffs-Appellants vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant-Appellee. File No. 77-1300)

THE ISSUES PRESENTED

I.

WHETHER A POOLING OF THE FUNDS OF DIFFERENT INVESTORS IS NECESSARY TO ESTABLISH A COMMON ENTERPRISE FOR PURPOSES OF FINDING THE EXISTENCE OF AN INVESTMENT CONTRACT UNDER THE FEDERAL SECURITIES LAWS

II.

WHETHER THE EXISTENCE OF AN AGREEMENT TO PARTICIPATE IN A COMMON ENTERPRISE IS SUFFICIENT TO STATE A CLAIM UNDER THE FEDERAL SECURITIES LAWS

III.

WHETHER THERE WAS A GENUINE DISPUTE AS TO THE MATERIAL FACT OF WHETHER A COMMON ENTERPRISE EXISTED WHICH PRECLUDED DISMISSAL OF PLAINTIFFS' CLAIMS UNDER THE FEDERAL SECURITIES LAWS

IV.

WHETHER THE DISTRICT JUDGE ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE COMMODITY EXCHANGE ACT

V.

WHETHER THE DISTRICT JUDGE ERRED IN DENYING PLAINTIFFS LEAVE TO FILE THEIR AMENDED AND/OR SUPPLEMENTAL COMPLAINT

(Excerpts From Pages 28-29 Of
Respondents' Brief)

III.

THE DISTRICT JUDGE ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE COMMODITY EXCHANGE ACT

The Commodity Exchange Act, 7 U.S.C. § 1 et seq. (herein the "CEA") prohibits fraudulent acts in connection with the purchase or sale of regulated commodity futures. It is well established that a private cause of action exists for violations of the CEA. *Deaktor v. L.P. Schreiber & Co.*, 479 F. 2d 529 (7th Cir. 1973); *Goodman v. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972). Based on that settled right of action, plaintiffs in Counts V and VI of their complaint charged defendant with engaging in conduct which not only violated provisions of the federal securities laws, but were also violative of provisions of the CEA.

In its motion to dismiss, defendant moved the District Court to dismiss "those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, to wit: Counts IV, V and VI of the Complaint."

By his memorandum opinion and his order dated February 23, 1977, Judge Thornton ordered that "Counts IV, V and VI of Plaintiff's Complaint be and the same hereby are dismissed." There were no words of limitation whatsoever in the order and thus the order dismisses Counts IV, V and VI, including claims under the CEA, *in their entirety*.

Plaintiffs are unable to fathom the basis upon which its CEA claims were thus stricken, particularly since

defendant did not even request such relief and there is not a shred of authority upon which that dismissal can rest. Nor can plaintiffs understand the refusal by Judge Thornton to amend his order to conform to the pleadings and to the law. Such dismissal of CEA claims and refusal to amend the Court's order are clearly erroneous. They should be reversed by this Court.

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JAN 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER
v.
J. J. CURRAN AND JACQUELYN L. CURRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

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In the Supreme Court of the United States

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PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

QUESTION PRESENTED

Whether a private right of action continues to be available to remedy violations of the antifraud provisions of Section 4b of the Commodity Exchange Act, as amended, 7 U.S.C. 6b.

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INTEREST OF THE COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission is an independent federal regulatory agency created in 1974 to administer the Commodity Exchange Act of 1936, as amended, 7 U.S.C. (& Supp. III) 1 *et seq.* ("the Act"). Under the Act, the Commission has exclusive regulatory authority over the trading of commodity futures contracts in the United States. See 7 U.S.C. (Supp. III) 2. The Commission's statutory duties include ensuring that commodity futures contracts are traded only on designated contract markets, registering various categories of commodity professionals, and enforcing the antifraud and other prohibitions of the Act through administrative and injunctive proceedings.[1]

Implicit in its statutory mandate is the Commission's obligation to ensure that the Act is enforced and interpreted consistently with Congress' remedial purposes. The Commission thus has a strong interest in seeing that all the legal remedies provided by the Act are made available to a commodity customer. It has been the Commission's consistent position that a customer who alleges fraud in connection with a commodity futures transaction may seek relief either through: (1) contract market arbitration proceedings (7 U.S.C. (Supp. III) 7a(11)); (2) Commission reparation proceedings (7 U.S.C. (Supp. III) 18); or (3) the courts, pursuant to an implied private right of action under the Act.

STATEMENT

In 1973, respondents opened accounts with petitioner for the purpose of trading commodity futures contracts (Pet.

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[1]See 7 U.S.C. 6, 6b, (Supp. III) 6d, (& Supp. III) 6k, (Supp. III) 6m, 7, (Supp. III) 8, 9, 13a-1 and (& Supp. III) 18.

App. A-4).[2] By April, 1974, respondents had sustained substantial losses in these accounts and petitioner acquiesced in respondents' demand that the accounts be closed (*id.* at A-5). It is alleged that at the conclusion of this period of trading, respondents' account had lost approximately $175,000, while petitioner had been paid $44,500 in commissions (*ibid.*).

On April 5, 1976, respondents brought this action in the United States District Court for the Eastern District of Michigan alleging, *inter alia*, that petitioner had engaged in fraudulent practices in violation of Section 4b of the Act, 7 U.S.C. 6b (Pet. 3; Pet. App. A-43). The district court ordered the Section 4b claim stayed pending arbitration, as provided in the customer agreement form signed by respondents (Pet. App. A-50). It also granted petitioner's motion to dismiss those of respondents' claims that were based upon violations of the federal securities laws (*ibid.*).

The court of appeals reversed that portion of the district court's order that had stayed respondents' Section 4b claim (Pet. App. A-50) and proceeded to address the question whether a private right of action exists under Section 4b of the Act (*id.* at A-23 to A-24). After applying the analysis established by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), for considering implied private rights of action (*id.* at A-30), the court of appeals focused on Congress' intent in enacting the 1974 amendments to the Act and concluded that it was "not persuaded that Congress intended to extinguish the pre-existing private right of action which had been generally acknowledged to exist under the Act" prior to 1974 (*id.*

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[2]Petitioner was at that time, and continues to be, registered as a futures commission merchant as required by Section 4d of the Act, 7 U.S.C. (Supp. III) 6d.

at A-36). Accordingly, the court of appeals held that respondents were entitled to maintain a private right of action under Section 4b (*id.* at A-37). Judge Phillips dissented (*id.* at A-37 to A-38).

DISCUSSION

1. When the petition for a writ of certiorari in this case was filed, the Commission did not believe that the question presented was one that warranted resolution by this Court. In the Commission's view, the court of appeals' decision was correct, and no conflict existed among the courts of appeals on this issue. The Second Circuit, the only other court of appeals to decide the question, had also concluded that private rights of action under the Act had not been affected by the 1974 amendments and were available under Section 4b as well as other provisions of the Act. *Leist* v. *Simplot*, Nos. 79-7402, 79-7464 and 79-7482 (2d Cir. July 8, 1980), petitions for cert. pending, Nos. 80-757, 80-895, 80-936.[3]

On December 16, 1980, however, the United States Court of Appeals for the Fifth Circuit held that, in light of the comprehensive nature of the 1974 amendments, a private right of action is no longer available to remedy violations of Section 4b of the Act. *Rivers and Lamb* v. *Rosenthal & Co.*, No. 79-1313.[4] This decision has created a conflict among the courts of appeals on the question of the existence of an

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[3]This opinion is unofficially reported at 2 Comm. Fut. L. Rep. (CCH) para. 21,051. In addition, two other courts of appeals had noted that the 1974 amendments did not appear to affect the continued viability of private rights of action under the Act. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F. 2d 129, 133 n.7 (8th Cir.), cert. denied, 444 U.S. 838 (1979); *Rosenthal & Co.* v. *CFTC*, 614 F. 2d 1121, 1123 (7th Cir. 1980).

[4]A copy of this decision has been filed with the Court as a joint appendix to supplemental briefs in support of the petitions in Nos. 80-757, 80-895, and 80-936 (hereinafter "J.A."). The Fifth Circuit also

implied private right of action under Section 4b.[5] Because of this conflict, commodity customers may now be unwilling to risk bringing a private right of action under Section 4b. As a result, customers who would otherwise file court actions alleging fraud against their commodity professionals may instead attempt to bring reparation claims before the Commission to remedy violations of Section 4b. These claims would exacerbate wha Congress has already identified as a substantial backlog in Commission reparation proceedings and would thereby undermine Congress' desire that reparations "bring about inexpensive and expeditious adjudication of customer claims." S. Rep. No. 95-850, 95th Cong., 2d Sess. 11 (1978). See also *id.* at 16. Because the administration of the Act will be furthered by a definitive resolution of this conflict as soon as possible,[6] the Commission now urges this Court to grant the instant petition for a writ of certiorari.[7]

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refused to recognize a private right of action under Section 4k of the Act, 7 U.S.C. (& Supp. III) 6k, and Commission Rules 32.3 and 32.9, 17 C.F.R. 32.3 and 32.9. J.A. 2a-4a.

[5]A conflict also exists among district courts that have addressed this question. Compare *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979), and *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F. Supp. 416 (S.D.N.Y. 1980) (private right of action inferred under the Act), with *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979), appeal pending, No. 80-1056 (5th Cir.), and *Mullis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 F. Supp. 1345 (D. Nev. 1980) (no private right of action). See also cases cited in *Leist* v. *Simplot, supra*, slip op. 4059-4060 n.19.

[6]The issue is currently pending before two other courts of appeals. *Alken* v. *Lerner and E. F. Hutton & Co.*, No. 80-1918 (3d Cir.); *Kotz and Kolar, Inc.* v. *Bache Halsey Stuart, Inc.*, No. 79-3442 (9th Cir.).

[7]Because no conflict exists among the courts of appeals, the Commission is not asking this Court to consider the second issue framed by petitioners, concerning the retroactive application of Commission Rule 180.3, 17 C.F.R. 180.3, which relates to arbitration of customer grievances (Pet. 26). Similarly, no direct conflict exists with respect to the holding of the Second Circuit in *Leist* v. *Simplot, supra*, finding an

2. Although the Commission urges the Court to grant this petition, the Commission continues to believe that the decision below is correct. Since its enactment in 1936, Section 4b of the Act has been the principal antifraud protection afforded to commodity customers. A private right of action serves as a "necessary supplement" to Commission enforcement action in providing the protections embodied in Section 4b. Cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). Accordingly, prior to 1974, there was an "unbroken line of decisions upholding a private right of action" under the Act. *Leist* v. *Simplot*, *supra*, slip op. 4054. Congress did not eliminate this right of action. As the Second Circuit concluded in *Leist*, "the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them." Slip op. 4072. In light of this congressional intent, it is clear that a private right of action continues to exist under Section 4b. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 698-699, 702-703, 710-711 (1979).

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implied private right of action under Sections 4a, 5(d), 5a(8), and 9(b) of the Act, 7 U.S.C. 6a, 7(d), 7a(8), and (Supp. III) 13(b), although the breadth of the language used in *Rivers* suggests that the Fifth Circuit would hold that no private right of action should be implied under those provisions. See J.A. 27a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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